[2018] **JMSC Civ 78**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 03814

BETWEEN	**VERA DALLAS** **(by her attorney Elmeda Robinson)**	**CLAIMANT**
AND	**L.P. MARTIN COMPANY LIMITED** **(trading as L.P. Martin Funeral Home)**	**DEFENDANT**

IN OPEN COURT

Lord Anthony Gifford Q.C. and Ms. Marissa Wright for the Claimant

Mr. Robert Moore for the Defendant

Heard: 13th and 25th October, 24th November, 2017, 8th February, 19th and 27th March and 11th May, 2018

Damages - Assessment - Default judgment - Deceit - Negligence - Causation - Damages for emotional distress - Mis-treatment of body - Inability to ascertain cause of death - Lack of closure

STEPHANE JACKSON –HAISLEY, J

BACKGROUND

[1] In the normal course of things children are expected to outlive their parents. When the order changes and a child pre-deceases a parent this can result in emotional distress. This is the unenviable position in which the Claimant Vera Dallas has found herself. Added to this is the uncertainty surrounding the cause of death and the way in which the Defendant treated the body. The task that confronts this Court is how to put a price on this emotional distress, how to quantify this in a way that sufficiently reflects the nature of the suffering she

endured. The task is compounded as the Court is faced with the challenge of quantifying damages for the depressive disorder occasioned solely by the acts attributable to the Defendant.

[2] The question of the Defendant's liability has been determined by a Default Judgment which was entered on February 12, 2016 with damages to be assessed. This followed upon the filing of a Claim Form and Particulars of Claim on July 31, 2015 and the subsequent filing of an Amended Particulars of Claim on July 7, 2016 by the Claimant Vera Dallas, who was then represented by her attorney Elmeda Robinson, against the Defendant L.P. Martin Company Limited (trading as L.P. Martin Funeral Home).

THE CLAIMANT'S CASE

[3] The deceased, 54-year-old Noel Ballantyne collapsed suddenly on November 14, 2014 at his home in Flint River in the parish of St. Mary. He was taken to the Port Maria Hospital where he was pronounced dead. The Claimant, his mother, although not then present within the jurisdiction, acted as next of kin and undertook responsibilities for all the cost arising from his death. She delegated her responsibilities to her son's spouse Ms. Lena Prendergast and other relatives who were in Jamaica. She engaged the services of her cousin Roan Ferguson, the director of Ferguson's Funeral Services located in the parish of St. Mary, to take charge of the funeral arrangements.

[4] The Defendant L.P. Martin Company Limited is the proprietor of a funeral home, located in the parish of St. Mary, providing services to families of deceased persons. While family members of the deceased were at the hospital awaiting the agents of Ferguson's Funeral Services to come for the body, two agents of the Defendant's Funeral Home arrived at the hospital and indicated to them that it was Mr. Ferguson who had sent them. This was a false statement and the family members of the deceased acted on this false statement and allowed the agents of the Defendant to remove the body. Mr. Ferguson arrived afterwards and on realizing that the body was already removed immediately went to the Police

Station accompanied by family members of the deceased and reported what had transpired. That same night they went to the Defendant's place of business and requested that the body be handed over to Mr. Ferguson. The Defendant refused to comply with their request.

[5] The following day, November 15, 2014 the family members returned to the Defendant's funeral home and again requested the body however they were told that they had to bring the death certificate as well as pay the sum of $22,717.50 before the body would be handed over. They returned on November 17, 2014 and again requested the body but the Defendant's agents refused to hand it over. On November 18, 2014 the family members returned, this time with a burial order and were presented with an invoice in the sum of $108,345.00 which included a charge for embalming. Under protest they paid the sum but the body was still not handed over as the agents of the Defendants claimed that there was no one there to release the body and advised them to return the following day at noon. On November 19, 2014 the family members returned to the funeral home and the body was handed over to Mr. Ferguson. Observations were made that an embalmment was carried out on the body that said morning or at the earliest the previous evening.

[6] The Claimant complains that the Defendant caused the body to be embalmed without any authorization or in consultation with her or any other family member. By reason of the embalmment, the Claimant was unable to have a post mortem examination carried out as she had intended to do in order to ascertain the cause of her son's sudden death. Further, that the embalmment made it impossible for a pathologist to analyse blood and other elements of the body and make findings as to the cause of death. Although at the time of these events, the Claimant was overseas, she was advised of all that had transpired by Ms. Prendergast. Further, she was sent photographs of her son's body in a state of partial embalmment.

[7] The Claimant pleaded that the Defendant's servants and/or agents made a false representation, knowing that it was false or were reckless as to its falsity. It was intended that the family members would act on this representation and they so did and allowed them to remove the body. Further, that another false representation was made when the family members were presented with an invoice for services to include an embalmment charge when at that time no embalmment had then commenced causing the family members to pay this invoice.

[8] The Claimant avers that the Defendant is therefore liable in the tort of deceit or in the alternative, negligence. The Claimant further avers that the actions of the Defendant caused her to suffer great distress and psychological damage as well as financial loss.

[9] The Particulars of Injury pleaded are that the Claimant suffered acute, emotional distress at the way the body was handled and developed symptoms of ruminating negative thoughts. This caused an emotional scar which developed into symptoms of sadness, decreased sleep, decreased appetite and anhedonia. On January 5, 2015 after visiting her son's grave she suffered a stroke causing her to experience severe weakness which further weakened her emotional resilience. She continues to suffer from Bereavement and Major Depressive Disorder, the stressors for which were the death of her son, the conflict with the Defendant, together with the inability to determine a conclusive cause of death. She requires ongoing psychological support.

[10] In respect of Special Damages, she claims $108,345.00 which represents the payment made to the Defendant and $120,000.00 which represents fees due to Ferguson Funeral Services for attendance at the Defendant's premises on five occasions.

[11] She also claims Aggravated Damages having regard to all the circumstances and Exemplary Damages having regard to the Defendant's desire to make a financial profit through the charges made for removing, storing and embalming

the body of the deceased and the fact that the Defendant calculated that the profits which he could make would exceed any damages which he might be liable to pay.

EVIDENCE AT TRIAL

[12] The Claimant gave evidence by video link. Her witness statement was allowed to stand as her examination-in-chief. The contents were largely consistent with her pleadings. During cross-examination when it was suggested that the reason she was not happy after the death of her son was because she missed him, she responded that the reason she wasn't happy was because they took away his body and she couldn't get it back. Further, that she lives alone and has no one to talk to. She sought to explain the reason for her depression in the following manner:

> *"Not because I miss him, because I know he has to die and I could get over the wounds I have now. I will get over his death because I know he has to die but I can't get over not knowing what killed my son. He was a good son, he never complained".*

[13] She was questioned about how the body was eventually prepared for the funeral and she said it was Mr. Roan Ferguson who did this and that he did a good job. These were her words:

> *"Yes, I am pleased about it because all my friends could view the body and say how him look good."*

[14] She was asked about what transpired when she visited Dr. Reynolds. It was suggested that she did not tell Dr. Reynolds that she had high blood pressure and she said she could not recall, nor could she recall telling her that she was suffering from other pre-existing medical conditions. She indicated that she is currently taking pills for depression and blood pressure and that she was taking them before her son's death. She went on to express how she felt in this manner.

> *"I was so upset and so frustrated at how they treated my son. I live alone, I have no one to take care of me. In that state of mind I couldn't go anywhere by myself so I just stay in the house and cry."*

[15] She was asked if she was upset based on what she was told by Ms. Prendergast and she said yes, she was upset when she heard how they treated her son's body. It was again suggested to her that it is because she missed her son that she is depressed and she replied that she misses her son but she is not depressed over it because she buried her mother and her father and didn't get depressed over it. It was suggested that she is upset because she has lost her best friend and best child and she replied that she was not upset about it because he died and everyone has to die but she got depressed over his body and the way they treated him.

[16] It was also suggested to her that the reason she is upset is because her family member Mr. Roan Ferguson did not have the benefit of treating her son, and she replied that he was the one they wanted to give the body to and he got a body that was terrible looking.

[17] It was suggested that the cause of her depression is Ms. Prendegast as she is the person who told her all these things and she replied that what she told her didn't put her in depression. She was asked questions surrounding when her mother died and whether she had any sense of feeling bereaved and she replied that she did and she said she had closure because she got the death certificate and she knew what happened. In cross-examination she was asked if she got a death certificate for her son or whether one was obtained and she said one was obtained but she doesn't know what killed him because he died suddenly. She was again asked if she was shown the death certificate and she said she couldn't recall but there was a paper. When asked again if she was shown the medical certificate or cause of death she said no.

Then the following suggestions were made:

Sugg: *If you were interested in knowing the true cause you would have secured a death certificate and medical certificate to say the cause of death.*

Ans: *I wouldn't say that because when I didn't get the body I was weak, depressed. I couldn't go through anything more. I would describe*

what they put me through as cruel and unusual punishment for what, didn't do anything.

Sugg: *L.P. Martin is not the cause of your depression if you do have any*

Ans: *Your suggestion is ridiculous, what they put me through, I don't eat, I don't sleep, all I was interested in was getting my son's body. I couldn't get my son's body.*

[18] She said she couldn't get closure as L.P. Martin had embalmed the body. It was suggested that the family did not request a post mortem and she responded by enquiring how could they have when they didn't get the body before and expressed that if they had handed over the body without embalmment they would have gotten it done. It was suggested that the embalmment did not prevent a post-mortem and she did not agree. It was suggested to her that she brought this Claim in order to further Mr. Ferguson's interest and she denied this.

[19] The Claimant relied on the testimony of three witnesses, Lena Prendergast, Roan Ferguson and Michael Elliot.

[20] The significance of Lena Prendergast's evidence was that she confirmed that she was the one who took care of all the arrangements after the death and was in constant communication with the Claimant throughout, keeping her apprised of what was happening in Jamaica.

[21] In cross-examination she too was asked if she examined the medical certificate that spoke to the cause of death and she said she did not. She was asked if she made any enquiries of the Doctor as to the cause of death and she said she did not. She was asked whether she had said to L.P. Martin that she wanted a post mortem done and she said not on the same day. She was also asked if when L.P. Martin released the body she had presented a death certificate and she said "Yes".

[22] Roan Ferguson gave evidence that he is a funeral director trading as Ferguson Funeral Services operating in the parish of St Mary. He spoke about being contacted by Ms. Prendergast to take care of the body of Noel Ballantyne and

that by the time he arrived at the hospital the body was taken by the Defendant. He reported this to the police and then went to the Defendant's Funeral Home however they refused to hand over the body as they did not have a death certificate. He returned on the 18th November with the death certificate and paid the invoice but the body was not handed over. It was the following day that the body was handed over. He noticed that the body was in a partial state of embalmment. He realised that it was freshly embalmed that morning because the fluid was still running from the body, there was blood and it was not sewn up and the body was just left "raw" with cuts. He took the body to Michael's Mortuary in Kingston.

[23] He indicated further that Ms. Dallas wanted a post mortem as she was not pleased with what was written on the death certificate and requested a post mortem. On her request, he took photographs and sent them to her. These were tendered into evidence. He asked Michael Elliot, the owner of Michael's Mortuary and a licensed embalmer about doing a post mortem and he told him that once the body is embalmed a post mortem cannot be done. He communicated this to Ms. Dallas.

[24] In cross-examination he indicated that he has been in the business for some nine years. He said he took photographs of the deceased by cell phone. He indicated that when he sent the photos to the Claimant he told her that the pictures might be disturbing. When it was suggested to him that it was as a result of sending these pictures to her that she became upset he pointed out that he sent the photos pursuant to her request. He denied sending them as a motive to market his funeral services. It was suggested to him that the incisions were opened by Michael's Mortuary and the sutures removed by them and he denied this but he agreed with the suggestion that the pictures were taken at Michael's Mortuary and that the incisions were normal practice.

[25] In cross-examination he agreed that L.P. Martin is one of his competitors in the funeral business in the parish of St. Mary. He was asked about Michael Elliot and

he agreed that he stores bodies for him. He said he is not a pathologist and has never conducted a post mortem and in fact has no qualifications on paper regarding pathology or embalmment procedures. It was suggested that it is because he is upset that he encouraged the Claimant to bring the case and he denied this.

[26] Michael Elliot also gave evidence indicating that he is a certified mortician and also a funeral director and the owner of Michael's Mortuary. He indicated that he has been certified since 1999 by Miami Dade Community College. That was the extent of his qualifications. He said he was contacted by Mr. Roan Ferguson and asked about conducting a post mortem on a body which had been embalmed and he advised him that he knows that a post mortem after embalmment would not be effective. This is due to the fact that embalmment changes the protein structure of the body. Therefore, the taking of tissue and blood samples would be inconclusive in determining the cause of death, if there is no apparent organ damage found within the deceased body.

[27] In cross-examination he agreed that he is not licensed to conduct post mortems and in fact has never conducted one and that he is not a pathologist and not certified in forensic medicine. He agreed that Mr. Ferguson asked him about the process of conducting a post mortem. He agreed that his report is limited in that he could not speak to the depth of blood sample finding as a forensic doctor could.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[28] Queen's Counsel pointed out that although this is an assessment of damages following a judgment in default of defence, the Court must be satisfied that the facts pleaded give rise to a cause of action in law as was enunciated in the case of **Natoya Swaby and Andrew Green v Southern Regional Health Authority and the Attorney General of Jamaica** [2012] JMSC Civ 151. He submitted that the task of the Court is to assess what would be fair compensation to the

Claimant for the psychiatric injury that she suffered as a result of the Defendant's actions.

[29] He traced the development of the law on nervous shock and in doing so cited cases to include, **Wilkinson v Downton** [1897] QB 57 **Alcock v Chief Constable of South Yorkshire** [1992] 1 AC 310 and **Tame v New South Wales, Annetts v Australian Stations Pty Ltd.** [2002] HCA 35. In examining the legal principles, he referred to the case **McLoughlin v O'Brian** 1982 UKHL 3 where Lord Wilberforce laid down the test for recovery of damages for psychiatric injury also called nervous shock to include proof of a close familial relationship between the Claimant and victim, proof that the Claimant was in close proximity to the event and that the shock suffered must be in the immediate aftermath.

[30] Queen's Counsel highlighted the challenges that a Claimant faced when seeking to prove that he suffered nervous shock when he was not physically present at the phenomenal event which were observed in the **Tame** case. Among the principles enunciated in that case is the fact that the Claimant did not have to be physically present at the accident or aftermath once there was a relationship between the applicants and the respondent, in combination with reasonable foreseeability of harm, to give rise to a duty of care. He submitted that these cases demonstrate that there is a limit to the measure of damages recoverable for psychiatric injury in negligence. They set out the rules which serve to limit the circumstances under which a Claimant in a negligence claim can recover damages for psychiatric injury.

[31] It was therefore submitted that the proximity test by which liability is limited to those who are "sufficiently proximate" to the acts complained of, is a test to be applied in cases of negligence but not in cases of intentional torts and so this limitation does not apply to this case as it is properly brought in the tort of deceit.

[32] Queen's Counsel contended that the **Tame** case is similar to that of Ms. Dallas' as she was among the range of persons expected to have rights to bury the body and so was owed a duty of care.

[33] He pointed out that one of the distinguishing features in this case was the fact that the main cause of action was deceit, negligence being only a further or alternative cause of action. Further, that the actions of the Defendant support deceit starting from the initial false statement, the removal of the body and the refusals to hand it over and the embalmment.

[34] Further, that if however, it were necessary to consider the principles referred to, the Court should place reliance on the **Tame** case where the Law concentrates more on the duty owed by the Defendant to the Claimant rather than the physical proximity test in which the manner in which the information came to the knowledge of the Claimant is important. The Claimant herein, although in Canada was the principal next of kin giving instructions through the family members and so the Defendant ought to have her within his contemplation and so in any case she would be entitled to all damages that flow.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[35] Counsel appearing for the Defendant submitted that despite this being an assessment based on a judgment in default the Claimant is still obligated to satisfy the court as to the averments in the pleadings and further that the evidence adduced does not substantiate these averments. The Court has to be satisfied as to what if any damages should be awarded to the Claimant to the extent of which damages are proven. Further, that causation is relevant and he relied on the case **Elita Flickenger v David Preble and Xtabi Resort Limited** (unreported) Supreme Court, Jamaica, Suit No. CL1997/F-013 judgment delivered November 10, 2010.

[36] He pointed out that in relation to the Claim for damages premised on the tort of deceit the doctrine of privity of contract prevents the Claimant from recovering damages under this tort as she did not have any personal dealings with the Defendant's company. Therefore, the Court would be obliged to determine the case based only on the principles of negligence which carry certain limitations. He relied on the **Alcock** case and the **Swaby** case to support the fact of the

limitations which he contended the Court will have to address its mind to. Such limitations include the class of persons whose claims should be recognised, the proximity of such persons to the negligent acts and the means by which the psychiatric disorder was caused. He submitted that the instant Claimant has failed to overcome these limitations as it was not clearly foreseeable that psychiatric trauma could/would likely have been caused to the Claimant who resided overseas.

[37] In reliance on the **Swaby** case he argued that Anderson J demonstrated an appreciation for the difficulties inherent in proving proximity and foreseeability in negligence cases where the Claimant was not directly proximate to the events. Further, that the Claimant has failed to establish the facts upon which her case is pleaded. Further, that there is nothing in the medical evidence which diagnoses the Claimant with Post-traumatic Stress Disorder and the medical evidence does not support her contentions. The medical report does not speak to the extent or duration of the Claimant's suffering and so the Court is not in a position to measure damages as purported by the Claimant.

THE SCOPE OF THE ASSESSMENT OF DAMAGES

[38] The Defendant, through its attorney-at-law participated actively at the assessment of damages. This was consistent with the principles enunciated in the Full Court decision of **Natasha Richards and Phillip Richards v Errol Brown and the Attorney General** [2012] JMSC Civ 151 in which it was ruled that Rule 12.13 of the Civil Procedure Rules (CPR) is unconstitutional and that a Defendant at an assessment of damages has a right to be heard on the quantum of damages. Further, that even if one has no positive case to put, the trial process will still benefit from cross-examination (which tests the witness) or by submissions which may bring to the attention of the Court aspects of the medical report or authorities on damages, relevant to the issue of quantum.

[39] Even before the Full Court's decision in the **Richards** case the Court of Appeal considered the ambit of a judge's role at an assessment of damages in the case

of **Winston Johnson v Norbert Lawrence** [2012] JMCA Civ 3. Although the Court of Appeal's ruling with respect to the participation of the Defendant was inconsistent with the ruling in the **Richards** case, it is noted that no point of unconstitutionality of CPR 12.13 was taken so the Court's concern was to strictly interpret the provision. The Court's pronouncement on the issue of the judge's role at the assessment remains good law. At paragraph 21 of the judgment the Court had this to say:

> *"…to argue that without cross-examination a claimant's loss will not be required to be proven is to ignore the assessment judge's duty to adhere to the principle of law that proof of damages is an essential pre-requisite for an award of damages. The assessment judge will no doubt apply the relevant principles irrespective of whether submissions are advanced on behalf of the defence."*

[40] The Claimant is therefore still obligated to prove damages on a balance of probabilities. It was argued by both Queen's counsel and counsel in their submissions that the Court should be concerned with the questions of proximity and foreseeability. The positions articulated were supported by the **Swaby** case in which Anderson J pointed out the following at the paragraph 10 of the judgment:

> *"This Court is of the considered opinion that it cannot be unmindful of the law as to liability for the purpose of assessing damages herein, this even where Judgment is entered against a Defendant whether by way of a default, or even if arising by some admission."*

From the dicta in that case it is suggested that the Court should not be oblivious to the cause of action even at the stage of the assessment of damages. The question that concerns this Court is the full extent to which a Court is to be concerned with the cause of action for the purposes of an assessment of damages post a default judgment.

[41] There is guidance provided by the Privy Council decision of **Strachan v The Gleaner Co. Ltd** [2005] 1 WLR 3204 [2005] UKPC 33, in which the question of whether a default judgment was akin to a final judgment came up for

consideration, Lord Millett said (delivering the judgment of the Privy Council) at paragraph 16:

> *"In their Lordships' opinion these questions are easily answered if three points are borne in mind. The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see* ***Pugh v Cantor Fitzgerald International*** *[2001] EWCA Civ 307 citing* ***Lunnon [sic] v Singh*** *(unreported) 1 July 1999, EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is res judicata. The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined."*

[42] This Privy Council decision placed emphasis on an English case which originated in the pre-CPR regime of **Lunnun v Singh** [1999] CPLR 587 which was said to still be good law. In the **Lunnun** case a judgment in default had been entered following a claim for damages to compensate the plaintiff for loss caused by leakage of water and sewage from the defendant's property. The defendant at the assessment of damages expressed that they would be taking issue with causation of the losses pleaded. The Court decided that the defendant could not contest causation, as that was already determined by the judgment in default. On appeal the defendant was successful and the court decided that the defendant could in fact contest causation but only in relation to quantum, as liability was already settled by virtue of the default judgment. This is how it was expressed:

> *"The default judgment is conclusive on the issue of the liability of the defendants as pleaded in the Statement of Claim. The Statement of Claim pleads that an unspecified quantity of effluent escaped from the defendants' sewer into the basement of the claimant's property. In addition it is, Mr Exall accepts, inherent in the default judgment that the defendants must be liable for some damage, resulting therefrom. But that, in my judgment, is the full extent of the issues which were concluded or settled by the default judgment. It follows, in my judgment, that in the instant case all questions going to quantification, including the question of causation in relation to the particular heads of loss claimed by the claimant, remain open to the defendants at the damages hearing."*

It was also pointed out that at the assessment of the damages the defendant might not take any point which was inconsistent with the liability alleged in the statement of claim, but subject to that might take any point which was relevant to the assessment of damages, including contributory negligence, failure to take reasonable steps to mitigate, and causation to the extent that the defendant's acts were not causative of any particular items of alleged loss. It was also said that:

"the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment."

[43] A similar position was adopted in the post-CPR case of **Symes v St George's Healthcare NHS Trust** [2014] EWHC 2505 (QB), which concerned a claim of clinical negligence by a patient against a hospital in respect of its treatment of him. The claim included detailed particulars of causation and loss. The defendant did not acknowledge service and judgment was entered for the claimant on liability for damages to be assessed. Before the master there was an application to set aside the default judgment but this failed. On appeal the only issue was whether the defendant was precluded by the default judgment from contesting causation issues that formed part of the 'liability case' as opposed to the 'quantum case'. At paragraphs 57 to 59 of this decision, the deputy judge sets out and analyses the relevant case law and provides a comprehensive review of the law on the effect of default judgments, a part of which is set out below;

*[57] "….the starting point is to look at the Particulars of Claim, which are to be regarded as "a proxy" for the default judgment obtained on 2 July 2013, in order to work out what the default judgment is to be taken as having decided, and whether, therefore, the Defendant is trying to go behind the issues which that default judgment is to be taken as having determined. This approach is consistent with the need, identified by Viscount Radcliffe in **Kok Hoong**, to scrutinise a default judgment "with extreme particularity" (or, as Lord Maugham LC put it in **New Brunswick**, "with complete precision") so as to ascertain "the bare essence of what" it "must necessarily have decided".*

*{58} In answering this critical question, it seems to me that I am bound to follow the approach adopted in **Turner** and **Lunnun**, an approach which has been followed in various subsequent cases (specifically, **Pugh, Enron, Carbopego, Strachan and New Century**) and which is consistent also with the view expressed by Sir Richard Scott V-C in **Maes Finance**. To adopt any different approach is simply not open to me, any more than it was open to Master Roberts. These are all cases in which*

the same approach has been adopted, albeit with different outcomes. No case was cited to me where a different approach has been applied. Nor, specifically, I am bound to observe, was any case cited to me in which it has been held that a defendant could not challenge causation in the face of a judgment in default where damages have been ordered to be assessed. ***Turner and Lunnun*** *(and* ***Carbopego****, a non-tort case) were, on the contrary, cases in which it was held that causation could be challenged notwithstanding the relevant judgment, whether a summary judgment (as in* ***Turner****) or a judgment in default (as in* ***Lunnun*** *and* ***Carbopego****). True, in* ***Turner*** *and* ***Lunnun****, the two tort cases, the defendants were precluded from being able to argue that no loss at all was sustained, because such an argument would be inconsistent with a judgment on liability in circumstances where, in a tort context, there has to be some damage caused by the tort for the cause of action to be complete. However, beyond this the defendants were permitted to take issue with causation. That was the actual decision in* ***Turner and Lunnun****, and it was also what Sir Richard Scott V-C made clear in* ***Maes Finance****, albeit when dealing not with causation but with the question of whether contributory negligence could be advanced in the context of an assessment of damages hearing, in the passage cited by Clarke LJ in* ***Lunnun****.*

{59} I am clear, as I say, that, in such circumstances, I must apply the approach explained in ***Turner*** *and* ***Lunnun****, both cases in which damage was a necessary ingredient of the claimant's cause of action: in* ***Turner****, a claim in the tort of negligence; and in* ***Lunnun****, a claim in nuisance. Authorities such as* ***Pugh*** *and* ***New Century****, in contrast, were concerned with very different allegations made by the claimants (in each case, the claims were not in tort but for breach of contracts of employment), and the defendants were attempting to advance arguments which went to the question of breach of contract. They were not cases in which the issue was causation, nor were they tort cases where, without damage caused by the relevant breach of duty, there is no cause of action at all. These authorities are, therefore, of only limited assistance in relation to the question which I have to decide."*

[44] A similar position was enunciated in the case **Merito Financial Services Limited v David Yelloly** [2016] EWHC 2067 (Ch) where the following was said at paragraphs 41 and 42:

"[41] It is not necessary for the Claimant actually to prove his case. The nature of a default judgment is that his allegations are unchallenged, and therefore must be accepted as true for the purposes of the judgment: CPR 12.11. It is therefore necessary to examine the particular allegations made, to see if they amount to a claim for "a specified amount of money", or on the other hand an allegation of a breach of some duty which requires loss and quantum to be assessed before the court can award damages or equitable compensation.

> *[42] There are three aspects to this enquiry. One is how the claim is formulated in summary terms in the Claim Form. The second is how it is set out in detail in the body of the particulars of claim. The third is what remedy is or remedies are sought in the prayer at the end of the particulars of claim. Each of these must be considered."*

[45] From the cases considered certain principles can be deduced. Firstly, in order to determine the true effect of the default judgment the pleadings must be closely scrutinized. An examination of the pleadings will aid in determining what the default judgment is taken to have decided. Secondly, the question as to whether or not all questions with respect to liability have been determined will be dependent on the pleaded cause/s of action. Thirdly, there is a distinction between causation on the liability issue and causation on the quantum issue. The fact of the default judgment means that issues in relation to causation with respect to liability have already been determined however causation issues with respect to quantum remain open. These principles seem to apply not only to default judgments but also to summary judgments and judgments on admission.

[46] In making the determination as to what has been established by the default judgment the starting point must be scrutinize the pleadings.

THE PLEADINGS

[47] A close examination of the pleadings will assist to determine what the default judgment is taken to have decided. This requires an examination of how the claim is formulated in the Claim Form, how it is set out in the body of the Particulars of Claim and what remedy or remedies are sought in the prayer at the end of the Particulars of Claim. In the Claim Form the Claimant specifically pleaded that she is seeking damages for personal injury and consequential loss arising from the Defendant's action which she has described as deceit and/or negligence. The accompanying Particulars of Claim was very detailed. It was further alleged that an employee of the Defendant made a false representation to the family members of the Claimant thereby causing the relatives to allow the body of the deceased to be taken to the Defendant's funeral home where the Defendant embalmed the body of the deceased resulting in the Claimant being

unable to have a post mortem examination in order to ascertain the cause of the deceased's sudden death.

[48] She pleaded that by reason of the deceits and/or negligence she suffered grave distress and severe psychological injury and has suffered loss and damage because she is not able to determine the cause of her son's death.

[49] The Particulars of the Injury suffered were set out with considerable detail. It was clearly stated that she suffered acute emotional distress at the way in which the body of the deceased was handled by the Defendant and because she was unable to determine the cause of his death. So from the outset it would have been clear that the loss/injury that was being alleged was not physical but rather of an emotional nature. This is not one of those cases in which the Claimant had alleged that she suffered some physical injury as well as emotional injury in which case there might be some issue as to whether the default judgment extended to the emotional injury. In this case, all the Claimant has alleged suffering from the outset is emotional harm. The effect of the default judgment is that the allegations as pleaded are taken to be true and so at the bare minimum the default judgment would have determined that there was some emotional harm, however the extent of the harm remains open to the Defendant to contest.

THE CAUSE/S OF ACTION

[50] The substantive cause of action is that of deceit. Negligence is pleaded in the alternative. When a default judgment is entered in these circumstances where it was signed by the Registrar, it is a purely administrative act, no pronouncement is made as to which cause of action is accepted when alternative causes of action are pleaded.

[51] The point has been raised on behalf of the Claimant that the measure of damages for negligence is different from that for deceit and also that the test of forseeability and proximity is different dependent on which cause of action resulted in the breach and so the extent of the damages will differ depending on the cause of action for which liability is established. Counsel for the Defendant

has not taken issue with that position and has also submitted that deceit is based on contractual principles so the Claimant having no privity of contract could not succeed there under. These are points that have to be carefully considered with the commencing point being an examination of the constituent of each cause of action.

[52] The Tort of Deceit is also called Fraudulent Misrepresentation. The elements of Fraudulent Misrepresentation were first set out **in Derry v Peak** (1889) 14 App. Cas. 337 and have since been discussed in other cases such as **Bradford Third Equitable Building Society v Borders**, [1941] 2 All E.R. 205 in which Viscount Maugham offered a complete description of the tort. According to his Lordship, the ingredients of a deceit action could be summarized thus: First, there must be a representation of fact made by words, or, it may be, by conduct. Secondly, the representation must be made with a knowledge that it is false. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing.

[53] The authors of **McGregor on Damages, 17th edition**, para 1962 have cautioned that the tort of deceit needs careful handling as far as damages are concerned because in the great majority of cases the action induced by the deceit is the entering into a contract by the plaintiff, either with the defendant tortfeasor or with a third party, and it is important in such circumstances to stress the difference between a measure of damages based on contract principles and a measure of damages based on tort principles.

[54] Negligence, on the other hand requires proof of a duty of care owed to the Claimant, a breach of that duty and proof that the Defendant's negligent conduct was the cause of harm to the Claimant and that the Claimant was, in fact, harmed or damaged. In the law of negligence, the test of causation not only requires that the defendant was the cause in fact, but also requires that the loss

or damage sustained by the Claimant was not too remote, that is it was foresseable.

[55] Therefore, only reasonably foreseeable damage may be recovered by an action in negligence. This means that at the time the tortfeasor committed the negligent act, it must have been reasonably foreseeable that damage of the same kind as the plaintiff suffered would ensue from it. The extent of the damage need not be foreseeable; and it matters not what the plaintiff in fact foresaw - the test is a purely objective one.

[56] Both of these torts are consistent with the general principles governing torts which dictate that some damage must have been occasioned by the Claimant in order for the tort to be actionable. So in this regard there is no distinction between the two torts. I am of the view that the default judgement is to be taken as having accepted in either case the elements to have been made out, the bare essence being that some damage took place.

[57] So therefore the fact of the default judgment connotes that there was some loss suffered. The law in fact makes a distinction between damages that can be recovered for negligence and damages that can be recovered for intentional torts such as assault, battery and even deceit. The question is whether this is a distinction that is necessary to be considered for the purpose of this assessment of damages.

[58] I am of the view that it is not the purpose of the Court at this juncture to assess whether the Claimant herself was privy to this contract or whether the injury to the Claimant was foreseeable or to take any other issue that impinges on liability. To do so would be inconsistent with the default judgment. The default judgment is to taken as accepting the facts. Among the facts pleaded is that the agents of the Claimant were acting on her behalf at all time. This is a point that might successfully have been made if the matter were tried or it might have been a point on which the judgment could have been set aside but we are long past that stage.

[59] It is to be noted that the main cause of action was deceit and that negligence was only pleaded in the alternative. The default judgment would first be taken as having accepted the deceit. In any event for intentional torts such as deceit the Defendant is liable for all damages even if the extent of the injury is unforeseeable. In **Doyle v Olby (Ironmongers) Ltd**, [1969] 2 QB 158 the Court of Appeal held that the Claimant is entitled to damages for any such loss which flows from the Defendant's deceit, even if it was not reasonably foreseeable.

[60] The default judgment is taken to have meant that some loss was sustained and based on the nature of the pleadings that the only loss suffered was of an emotional nature. The Claimant is entitled to compensation for all damages that flow from the deceit. The Defendant can however argue that the extent to which she complains of is not all his responsibility. This is because although causation in respect of liability has already been determined, causation in respect of the extent of the loss is yet to be determined. There is a fine line between the two so this must be examined with precision.

CAUSATION

[61] The **Symes** case makes it clear that at the assessment of damages, there still remains the question of causation with respect to quantum which requires the Court to consider issues such the extent of the damages. All issues going to quantification remain open to the Defendant to challenge. So the Defendant will be able to challenge questions of causation for the loss claimed. The questions as to how much injury has the Claimant sustained and how much of that injury is attributable to the actions of the Defendant will have to be considered.

[62] The fact of the default judgment means that the Claimant has suffered some damage however the Defendant argues that it is the death of the Claimant's son that is the cause for all of her emotional distress and not the actions of Defendant. It does preclude the Defendant from arguing that there has been no loss as that would be inconsistent with the default judgment. The Defendant can however argue that the emotional distress suffered by the Claimant is not

attributable solely to the actions of the Defendant or that the emotional distress indicated is exaggerated.

THE ISSUE

[63] Having settled the issue of what can be argued at this stage I am left with the sole issue of what is the quantum of damages that should be awarded to the Claimant.

DISCUSSION

[64] In making a determination as to the quantum of damages to be awarded to the Claimant I must take into account the medical report of Dr. Peta-Gaye Reynolds and the evidence given during the hearing of the matter.

[65] According to Dr. Reynolds the ongoing conflict with the funeral home had made the bereavement process difficult for the Claimant causing her to develop symptoms of Major Depressive Disorder. Dr. Reynolds opined further that the stressors for this were the death of her son, the conflict with the funeral home regarding the arrangements along with the inability to determine a conclusive cause of death as no autopsy was done. In answer to one of the questions posed by counsel for the Defendant she indicated that the symptoms were compounded by Ms. Dallas' feeling of not being able to care for her son appropriately after his death and not being able to have an autopsy to determine the cause of death.

[66] This is a clear indication that the Major Depressive Disorder was not caused solely from the actions of the Defendant. My task therefore would be to determine what portion of the emotional disorder was caused solely by the actions of the Defendants, its agents and/or servants.

[67] The Doctor did not attempt to apportion the element of the disorder that resulted from the inability to care for her son appropriately and the uncertainty, no doubt because this would have been a difficult if not impossible task. But then the Court is called upon to do that, to do what the medical expert did not attempt to do. The Court is called upon to measure the immeasurable. How then does one

determine the extent to which each factor contributed to her emotional distress. It is the Claimant who bears the burden of proof throughout and it is her duty to satisfy me on a balance of probabilities as to how much of her loss is attributable to the actions of the Defendant alone.

[68] It may be said that where the Claimant cannot satisfy the Court as to the correct apportionment, the award should be a nominal award in circumstances such as the present. However, this situation is to be distinguished from a situation in which no harm has been established which would be one appropriate for nominal damages.

[69] An English case which provides some assistance is **Thompson and others v Smiths Shiprepairers (North Shields) Ltd** [1984] 1 All ER 881, a case in which the claimant's hearing became impaired as a result of working in the defendant's factory without ear protective gears. The Court found that the defendant's liability commenced after a period and that they were not responsible for the loss of the claimant's hearing before a particular time largely because there was no requirement before that time to provide ear protective gears. It was held that the plaintiffs were not entitled to recover their loss in full because a substantial part of the impairment of their hearing took place before the defendants were in breach and although precise quantification was impossible, the court had to apportion the loss and make the best estimate it could in the light of the evidence making the fullest allowances in favour of the plaintiffs for the uncertainties known to be involved in any apportionment.

[70] I am attracted to this position and so will approach this task with a view to making the best estimate in the light of the available evidence using appropriate authorities. Queen's counsel submitted that although there is no precedent for the mistreatment of the body of a deceased person, the cases of misdiagnosis of women patients as being HIV positive provide valuable guidance. To that end he relied on the case of **Joan Morgan et al v Minister of Health et al** (unreported) Supreme Court, Jamaica, Claim No HCV 00341 of 2005 judgment delivered

December 19, 2007. He submitted that in that case after a misdiagnosis of HIV the claimant suffered very similar symptoms to that of the claimant herein such as anxiety during interview, depressive symptoms, severe self-doubt, flashbacks and damage to her sexual life. She was diagnosed with severe Post-traumatic Stress Disorder and was awarded $3,500,000.00 which now updates to $7,100,000.00.

[71] Reliance was also placed on the case of **Karen Reid v Harbour View Medical Centre, Ministry of Health and the Attorney General of Jamaica** [2014] JMSC Civ. 56, another cases of misdiagnosis of HIV which existed for some two years. In that case the claimant was awarded $8,500,000.00, a sum which now updates to $9,400,000.00. Queen's counsel submitted that the **Joan Morgan case** is the more similar of the two and asked that the Court make an award in the sum of $6,000,000.00.

[72] The Claimant also relied on the case of **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ 63 and submitted that there should be an award for aggravated damages.

[73] Counsel for the Defendant sought to distinguish these cases, indicating that there are not comparable.

[74] In examining the **Joan Morgan** case, it is noted that Ms. Morgan was actually diagnosed as having severe Post-traumatic Stress Disorder. The diagnosis of the Claimant herein fell below that as she was diagnosed with Major Depressive Disorder. All of Ms. Morgan's Post-traumatic Stress Disorder emanated from the actions of the Defendant. This is not so in this case as according to the Doctor the stressors for her condition were the death, the conflict and the inability to determine a conclusive cause of death. The **Karen Reid** case, I find to be even further removed from that of the Claimant herein.

[75] The **Swaby** case is also distinguishable however there are some features which are rather similar with respect to Ms. Swaby. It bears the most resemblance to

the instant case. Both claimants suffered the loss of a child. Both have faced the uncertainty surrounding their child and his body and the lack of closure. In the **Swaby** case since no body was recovered, then that creates uncertainty, in the instant case, since no autopsy can be done, that also creates uncertainty. In the **Swaby** case the body of the baby disappeared whilst in the custody of the defendant. In this case the body of the deceased was "mis-treated" whilst in the custody of the Defendant.

[76] According to the Defendant, the Claimant herein is in a similar position to the male Claimant who was found to be far removed, not sufficiently proximate to the occurrences. That argument is not successful here as I have found that such an argument cannot be made at this stage.

[77] Ms. Swaby was diagnosed as having Post-traumatic Stress Disorder which is different from the diagnosis of this Claimant. It would appear to me then that Ms. Swaby's suffering would be more severe than that of the Claimant herein.

[78] In the evidence the Claimant herself sought to explain that she was depressed because of how they cared for her son and how they treated him. Further, that she is not upset about his death, as everyone has to die but the situation wasn't handled right.

[79] I don't believe the Claimant in terms of how she said the uncertainty affected her for several reasons. Firstly, she has sought to make light of his death by saying that everyone has to die and that she had previously suffered from the death of her parents, but in the normal course of things parents are excepted to pre-decease children so her son's death especially based on the relationship they shared, would have been expected to affect her in a significant way and this is actually what the Doctor has said. Secondly, when it was suggested to her that she would have secured the death certificate if she was interested in knowing the true cause of death, her response was that when she couldn't get the body she was weak and depressed and couldn't go through anything more. I have had to

consider if she was unable to go through securing the death certificate, how would she have been able endure going through the post mortem.

[80] In the light of the evidence given by the Claimant, in particular that during cross-examination, I formed the distinct impression that the state of the body affected her greatly. This was significant for her because of how she described what they put her through as being cruel and inhumane punishment and the priority she placed on how good the body looked at the funeral. She has spoken at length about the way they treated his body although she was not present. This was no doubt based on what she observed from the photographs which were sent to her and what she was told. I am of the view that her distress was worsened when she saw photographs of the body. These photographs were not sent by the Defendant or any agent of the Defendant but by Mr. Ferguson, another funeral director. Although Mr. Ferguson indicates that she requested them the Claimant herself does not say this.

[81] I have examined the circumstances under which the photographs were taken and sent to the Claimant. Firstly, the fact that they were taken by a different funeral director at a different funeral home several hours after being transported in conditions unknown to this Court. Secondly, the lack of evidence as to whether the condition the body was in when the photos were taken was the same as when it left the custody of the Defendant. Thirdly, the fact that it was said by Mr. Ferguson that what was done to the body was not unusual. Fourthly, the fact that this was done without the knowledge of the Defendant. I couldn't help but wonder what was his motive for showing her. Was it to show the transformation after his work or an advertisement for his funeral services? That would be at best self-serving.

[82] In all the circumstances, I find this action to amount to a wrongful intervening act. The authors of **McGregor on Damages 16th edition** have indicated at paragraph 167 that although no hard and fast rule should be laid down as to wrongful intervening acts, the tendency is to hold the Defendant not liable for any further

damages. This would operate the break the chain of causation and the Defendant should not be held responsible for the added trauma caused by viewing these photographs.

[83] I am concerned also that although the Claimant was already taking medication for depression this was not communicated to the Doctor. Although, in light of the egg shell skull principle, the Defendant must take the Claimant as he found her, I find that it would have been important for the Doctor to be made aware of this. I am of the view that the Claimant has exaggerated the extent of her depression caused by the Defendant's action. I take into account that she is saying the Defendant's action has caused her to be deprived of ascertaining the cause of her son's death. Yet, although she knows that a death certificate was obtained, she does not know or recall if she has ever seen it. If she was so concerned with finding out the cause of his death, I would have expected her to at least make some enquiries or try to ascertain if and what it said with respect to the death of her son. She did not indicate that she did this. Even her agent in Jamaica says she did not examine any medical certificate with respect to the death nor has she spoken to the Doctor. This has caused me to feel that the Claimant is not being totally honest when she suggests that this is the cause of all her emotional distress. Wouldn't the death certificate of the Doctor have been able to assist with the cause of death? Even by way of mitigation, she has not sought to get access to this document or speak to a Doctor who saw him. Perhaps this might have assisted her somewhat to get some information as to the cause of his death or even to determine whether a post mortem was necessary. The quantum of damages to be awarded is usually reduced in certain circumstances, where the Claimant has failed to mitigate his loss.

[84] In determining the quantum, I find the **Swaby** case to offer the most guidance however. I have made allowances in favour of the Claimant for the uncertainties involved in this apportionment however, I am constrained to discount the award significantly for the following reasons:

- The cause of the Claimant's emotional distress was three fold;
- The level of her emotional distress did not amount to Post-traumatic Stress Disorder;
- The portion attributable to the actions of the Defendant has been exaggerated by the Claimant;
- The Claimant has failed to mitigate by examining the death certificate;
- The medical report only related to the time up to August 9, 2016 and the Doctor was not provided with all relevant information; and
- In the Swaby case the Claim was not only for loss of the baby's body but also loss of the baby.

In the **Swaby** case the award made was $3,861,686.00 a sum which updates to $4,977,061.00. Taking into account all of what I have indicated, I would estimate the injury suffered by the Claimant herein to be about one fifth of that in the **Swaby** case and so I am prepared to award her the sum of $1,000,000.00 for General Damages.

AGGRAVATED DAMAGES AND EXEMPLARY DAMAGES

[85] In addition to General Damages a party may claim Aggravated Damages and/or Exemplary Damages. In the often cited decision of **Rookes v Barnard** [1964] A. C. 1129 Lord Devlin examined the elements required for both Aggravated Damages and Exemplary Damages.

[86] In respect of Aggravated Damages, he said this at page 1221:

> *"It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite of the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride..."*

[87] Similarly in the case of **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ 63 the Court of Appeal provided some direction on the scope of Aggravated Damages at paragraph 22 of the judgment:

> *"It is to be assumed that by identifying these factors, the learned trial judge recognized that aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond what he would have received for the assault, false imprisonment and malicious prosecution."*

[88] The Court in **Rookes v Barnard** in discussing Aggravated Damages went on to highlight at paragraph 29, that the fact that this award is one which is compensatory, as distinct from being punitive, must be borne in mind and that there is a risk of over compensation arising out of double counting. Lord Devlin also examined the circumstances under which an award for exemplary damages should be made at page 1226 where he opined as follows: -

> *"...where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the others, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."*

[89] There are three recognised categories in which exemplary awards are possible. They are oppressive, arbitrary and unconstitutional conduct by government servants, conduct calculated to result in profit, and express authorisation by statute. The Claimant has sought exemplary damages on the basis that the Defendant's conduct was calculated to result in profit. This is one of the recognised categories under which such an award can be made. However, having examined all the circumstances, there is insufficient evidence on which to say that the Defendant had calculated that the money to be made out of his wrong doing will probably exceed the damages at risk and support an award for Exemplary Damages. In respect of Aggravated Damages, I have not been able to identify any feature in the Defendant's conduct that would require additional compensation for the Claimant herein thereby requiring an award for Aggravated Damages.

SPECIAL DAMAGES

[90] The default judgment is taken to have determined that the Defendant is liable for all the Special Damages. The Claimant is entitled to the full Special Damages claimed.

[91] My orders are as follows:

1) General Damages awarded in the sum of $1,000,000.00 with interest at a rate of 3% from July 31, 2015 to May 11, 2018;

2) Special Damages awarded in the sum of $228,345.00 with interest at a rate of 3% from November 14, 2014 to May 11, 2018;

3) No award is made for Aggravated Damages or Exemplary Damages; and

4) Cost to the Claimant to be agreed or taxed.